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EXAMINER	
WONG, LESLIE A	

ART UNIT	PAPER NUMBER
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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Application Number: 10/646,852
Filing Date: August 22, 2003
Appellant(s): DYBING, STEPHEN T.

David Buckingham
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed March 19, 2010 appealing from the Office action mailed August 20, 2009.

(1) Real Party in Interest

The examiner has no comment on the statement, or lack of statement, identifying by name the real party in interest in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The following is a list of claims that are rejected and pending in the application:

Claims 2-8, 10-13, 16-22, 27, and 33-45.

(4) Status of Amendments After Final

The examiner has no comment on the appellant's statement of the status of amendments after final rejection contained in the brief.

(5) Summary of Claimed Subject Matter

The examiner has no comment on the summary of claimed subject matter contained in the brief.

(6) Grounds of Rejection to be Reviewed on Appeal

The examiner has no comment on the appellant's statement of the grounds of rejection to be reviewed on appeal. Every ground of rejection set forth in the Office action from which the appeal is taken (as modified by any advisory actions) is being maintained by the examiner except for the grounds of rejection (if any) listed under the

subheading "WITHDRAWN REJECTIONS." New grounds of rejection (if any) are provided under the subheading "NEW GROUNDS OF REJECTION."

(7) Claims Appendix

The examiner has no comment on the copy of the appealed claims contained in the Appendix to the appellant's brief.

(8) Evidence Relied Upon

WO 02/096208	Carr	12-2002
6,358,551	Sadowsky et al.	03-2002

(9) Grounds of Rejection

It is noted that provisional application 60/405791 does not correspond to the current application. Appellant is not entitled to the priority date of the provisional application.

The following ground(s) of rejection are applicable to the appealed claims:

Claims 2–8, 10-13, 16-22, and 38-42 stand rejected under 35 U.S.C. 102(e) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Carr (WO 02/096208).

Carr teaches a process for preparing an enhanced-solubility milk protein concentrate comprising providing a milk protein concentrate in aqueous solution/suspension and adding at least one monovalent salt (e.g. sodium chloride) in an amount that confers enhanced solubility on the product (see entire document, especially the abstract and claims). Carr teaches 0.013-0.30 moles of cation added per 100g protein (see claim 10). Carr teaches the use of the prepared milk protein

concentrate in the preparation of cheese wherein protein and concentrated fat (i.e. cream) are added to the enhanced-solubility milk protein concentrate (see Example 9), wherein the cheese is then prepared by a conventional process.

The claims differ appear to differ as to the recitation of increased emulsion capacity and stability.

An increase in the emulsion capacity and stability would be no more than inherent and/or obvious to that of Carr as the same components and process steps are used.

As noted by Appellant claims 43-45 were inadvertently missing from the rejection under 35 U.S.C. 103(a) and are now included.

Claims 27, 33-37, and 43-45 are rejected under 35 U.S.C. 103(a) as being unpatentable over Carr (WO 02/096208) in view of Sadowsky et al (US 6358551).

Carr is cited as above.

The claims differ as to the recitation of specific cheese making steps.

Sadowsky et al teach conventional cheese making steps including combining reconstituted skim milk with a concentrated milk fat, homogenization, productions of a standardized milk, and use of the standardized milk to produce cheese (see entire patent, especially Figure 1).

It would have been obvious to a person of ordinary skill in the art, at the time the invention was made to use conventional cheese making steps as taught by Sadowsky

et al in that of Carr because Carr recites the use of a conventional process and Sadowsky teaches the steps of a conventional cheese-making process.

(10) Response to Argument

Appellant argues that the current application is entitled to the priority date of provisional application 60/405791.

Provisional application 60/405791 does not correspond to the current application. Specifically, 60/405791 is not directed to the addition of a monovalent salt.

Appellant refers to paragraphs [0002], [0006], [0007], [0014], [0015], [0016], [0018], [0019], [0021], [0022], and Figure 1 of provisional application 60/405791. However, none of these paragraphs or Figure 1 teaches "adjusting the ionic composition of the hydrated protein solution to enhance its ability to emulsify fat in water." Paragraph [0021] refers to ionic strength but there is no teaching of how the ionic composition would be adjusted or any reference to a monovalent salt. The provisional application does not teach any means to adjust the ionic strength.

Provisional application 60/405791 does not describe adjustment of the ionic composition in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention.

Appellant is not entitled to the priority date of the provisional application.

Appellant argues that Carr does not teach the steps or order of steps in Claim 38, that Carr does not teach "adjusting the ionic composition of the hydrated protein solution to enhance its ability to emulsify fat in water," that Carr is directed to making low fat

products, that Carr does not teach adding salt to the mixture, and that there is no basis for inherency.

Carr teaches a process for preparing an enhanced-solubility milk protein concentrate comprising providing a milk protein concentrate in aqueous solution/suspension and adding at least one monovalent salt (e.g. sodium chloride) in an amount that confers enhanced solubility on the product (see entire document, especially the abstract and claims). Carr teaches 0.013-0.30 moles of cation added per 100g protein (see claim 10). Carr teaches the use of the prepared milk protein concentrate in the preparation of food products including cheese wherein protein and concentrated fat (i.e. cream) are added to the enhanced-solubility milk protein concentrate to produce a fat containing liquid (see Example 9), wherein cheese is further prepared by a conventional process.

Appellant does not exclude additional steps of Carr.

An increase in the emulsion capacity and stability would be no more than inherent and/or obvious to that of Carr as the same components and process steps are used. It is further noted that Appellant merely claims “enhance its ability to emulsify fat.” Appellant does not specifically claim an enhanced emulsification.

Certainly as you enhance the solubility then you necessarily enhance “the ability to emulsify.” If a protein were not soluble then it would be unable to emulsify. Any improvement in solubility would increase the ability to emulsify.

Appellant argues that Carr and Sadowsky fail to disclose a process to make cream as set forth in claim 33.

Carr teaches the use of the prepared milk protein concentrate in the preparation of food products wherein protein and concentrated fat (i.e. cream) are added to the enhanced-solubility milk protein concentrate to first produce a fat containing liquid (see Example 9), prior to preparing cheese. Carr specifically teaches the combination of the concentrated protein with a concentrated fat (i.e. cream). The adjustment of fat content is well-within the skill of the art. If a low fat product is desired the fat content may be decreased and if the higher fat product is desired the fat content of the starting materials may be increased.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Leslie Wong/
Primary Examiner, Art Unit 1781

Conferees:

/Keith D. Hendricks/
Supervisory Patent Examiner, Art Unit 1781

/William Krynski/
Quality Assurance Specialist, TC 1700